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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR A WRIT OF CERTIORARI

or, in the Alternative,

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE CLERK OF THE SUPREME COURT OF THE STATE OF IDAHO, FREDERICK C. LYON

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50 pp

QUESTION PRESENTED FOR REVIEW

1. When a state trial court denies defendants' motion to dismiss or motion for summary judgment on a claim of qualified immunity under 42 U.S.C. § 1983, do defendants have a federal right to immediate appellate review of the claim of qualified immunity before discovery and trial?

PARTIES TO THE PROCEEDING

The Idaho State Liquor Dispensary was an additional party to the proceeding before the state trial court, but was not a party to the dismissed appeal before the Supreme Court of Idaho. The remaining parties to the proceeding are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI AND/OR FOR WRIT OF MANDAMUS

State actor-Petitioners Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers respectfully pray that a writ of certiorari and/or a writ of mandamus issue to review the orders of the Clerk of the Supreme Court of the State of Idaho in *Fankell v. Johnson*, Idaho Appeal No. 22880, dismissing Petitioners' appeal from a trial court denial of a motion to dismiss, which was treated by the trial court as a motion for summary judgment, on the ground of qualified immunity under 42 U.S.C. § 1983.

OPINIONS BELOW

The April 23, 1996, order of the Clerk of the Idaho Supreme Court dismissing the appeal, and the May 23, 1996, Order of Clerk of the Idaho Supreme Court denying the petition for rehearing are not reported. The orders are reproduced in the Appendix to this petition.

JURISDICTION

The order of the Supreme Court of Idaho dismissing State actor-Petitioners' appeal was filed April 23, 1996. The petition for rehearing was denied May 23, 1996. This petition is filed within 90 days of the denial of rehearing.

Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257 on their claim of a denial of an "immunity . . . claimed under

the . . . statutes of . . . the United States" and the mandamaus authority conferred on this Court (and all other federal courts) by 28 U.S.C. § 1651(a) to issue "all writs necessary or appropriate in aid of their respective jurisdictions" to aid the Court's certiorari jurisdiction.

STATUTORY AND RULE PROVISIONS

42 U.S.C. § 1983 provides:

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Idaho Appellate Rule 11(a) provides:

> **Rule 11. Appealable judgments and orders**
>
> An appeal as a matter of right may be taken to the Supreme Court [of Idaho] from the following judgments and orders:
>
> (a) Civil Actions. From the following judgments and orders of a district court in a civil action:

> (1) *Judgments, orders and decrees which are final*, including orders of the district court granting or denying peremptory writs of mandate and prohibition.
>
> (2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.
>
> (3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.
>
> (4) Any contempt order or judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.
>
> (5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.
>
> (6) An order granting or denying a motion for judgment notwithstanding the verdict.
>
> (7) Any order made after final judgment including an order denying a motion to set aside a default judgment, but excluding an order granting a motion to set aside a default judgment.

Emphasis added.

STATEMENT OF THE CASE

Procedural and Factual Background

Respondent Kristine Fankell is a former employee of the Idaho State Liquor Dispensary (the Dispensary), an agency of the State of Idaho. Petitioners Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers are officers or employees of the Dispensary, *i.e.*, they are state actors for purposes of 42 U.S.C. § 1983. On April 19, 1995, Respondent sued State actor-Petitioners and the Dispensary in Idaho state district court under 42 U.S.C. § 1983 and § 1988. Her First Amended Complaint filed thereafter plead two causes of action under § 1983, both of which arose out of termination of her employment by the Dispensary on April 22, 1993. She sought monetary damages, including punitive damages.

State actor-Petitioners answered, pleading qualified immunity as an affirmative defense. They moved to dismiss on grounds including qualified immunity. The trial court, treating the motion to dismiss as a motion for summary judgment, denied the motion from the bench. On February 23, 1996, the court filed a written order summarily denying the motion without explanation.

State actor-Petitioners filed a timely notice of appeal to the Supreme Court of Idaho, stating in their notice of appeal that they were appealing "from that portion of the Order . . . rejecting [Petitioners'] defense of qualified immunity under 42 U.S.C. § 1983." App. 6a. The Clerk of the Idaho Supreme Court *sua sponte* issued a cursory order dismissing the appeal "for the reason that it is not from a final order or judgment" under Idaho Appellate Rule 11. App. 1a-2a. State actor-Petitioners petitioned for

rehearing and provided a memorandum briefing the issue of the finality of and the immediate appealability of trial court denials of motions that raise a defense of qualified immunity under 42 U.S.C. § 1983. App. 8a-22a. The Clerk of the Idaho Supreme Court denied the petition for rehearing. App. 3a-4a. State actor-Petitioners now bring this petition for a writ of certiorari and/or for mandamus.

SUMMARY OF ARGUMENT

The state courts are split on the issue of whether § 1983 defendants have a right to appeal denial of their qualified immunity motions without proceeding to discovery or trial before appellate review. The majority of states that have reached the issue allow such appeals, but Idaho has joined the ranks of states that do not. A number of state supreme courts have held that qualified immunity is a substantial federal right that cannot be extinguished by a state procedural rule denying an immediate appeal following a trial court's rejection of the defense. The opposite line of cases holds that state procedures cannot be altered or are not preempted by this Court's qualified immunity precedents. Resolution of this conflict in state application of federal law is worthy of this Court's review.

In addition, there is a split between § 1983 defendants' federal appellate rights and state appellate rights in states like Idaho. Federal courts of appeal are required to take appeals from denials of defendants' qualified immunity motions, but Idaho and several other states deny such appeals. This means there are different rules of

decision for protection of defendants' qualified immunity rights not to be subjected to discovery and trial for defendants sued in federal district court and for defendants sued in state court in states in which these appeals are not allowed. This is directly contrary to this Court's precedent that state law cannot be applied to defeat federal rights in § 1983 actions.

There are significant numbers of § 1983 defendants in state courts who are and will continue to be affected by this disparate treatment among the state courts and between federal courts and some state courts. This is an appropriate case for the Court to issue a writ of certiorari to resolve this split of authority among the state courts and disparity of treatment between defendants in federal and state courts for state courts that do not recognize the right of immediate appeal of denial of qualified immunity motions under § 1983. Lastly, the Court should issue a writ of mandamus to the Clerk of the Supreme Court of Idaho if necessary to preserve a case or controversy for its decision and if necessary to provide relief to State actor-Petitioners.

REASONS FOR GRANTING THE PETITION

1. State Appellate Court Decisions Directly Conflict Regarding Whether § 1983 Defendants Have a Right to Immediate Appeal of Denial of Their Qualified Immunity Motions

As with federal actors sued in their personal capacities directly under the Constitution, qualified immunity is

often the most important defense available to state actors sued in their personal capacities under § 1983. Qualified immunity is an important substantive right because it not only shields defendants from liability, it also shields them from burdens of litigation (*e.g.*, discovery) and from trial itself. The law of qualified immunity has developed both in suits brought against federal officers and employees under the Constitution itself and in suits brought against state officers and employees under § 1983, and the Court has said "that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' *Butz v. Economou*, [438 U.S. 478, 504, 98 S. Ct. 2894, 2909, 57 L. Ed. 2d 895 (1978)]." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n.30, 102 S. Ct. 2727, 2738, n.30, 73 L. Ed. 2d 396 (1982). Accordingly, this petition cites the immunity law of § 1983 interchangeably with the immunity law of suits against federal officers or employees brought directly under the Constitution.

The Court has held that a denial of a motion to dismiss and that a denial of a motion for summary judgment on the ground of qualified immunity is a "final decision" appealable under 28 U.S.C. § 1291 under the collateral order doctrine. A pre-trial denial of a qualified immunity motion is conclusive as to that right, and if defendants are forced to prepare for and stand trial based upon an erroneous denial of a qualified immunity defense that cannot be immediately appealed, they have irretrievably lost their qualified immunity protection. See, *e.g.*, *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S. Ct. 834, 838, 133 L. Ed. 2d 773 (1996); *Seigert v. Gilley*, 500 U.S. 226,

231-32, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 524-30, 105 S. Ct. 2806, 2814-17, 86 L. Ed. 2d 411 (1985); *see also, Johnson v. Jones*, 515 U.S. ___, ___, 115 S. Ct. 2151, 2158, 132 L. Ed. 2d 238 (1995).

Despite the Court's holdings under federal appellate statutes that a trial court's denial of a qualified immunity motion is a "final decision" that is immediately appealable or the immunity will be effectively lost, state appellate courts are divided on whether defendants are entitled to an immediate appeal of a denial of a qualified immunity motion when the § 1983 action is brought in state court. There are at least three groups of state appellate decisions addressing appealability in state courts of a denial of a qualified immunity motion under § 1983: the first guarantees immediate appellate review before there are further proceedings, the second leaves the possibility of immediate appellate review before further proceedings to the discretion of the reviewing appellate court, and the third denies appellate review before further proceedings altogether. Under these divided precedents, numerous state actors who each year are sued under 42 U.S.C. § 1983 in state courts risk losing the benefits of their most important federal defense – avoidance of discovery and trial – simply because of the forum in which the action was brought.

First, the appellate courts of at least three states – Colorado, Oklahoma and Maine – have held that they must accept these immediate appeals by virtue of the primacy of federal law, notwithstanding contrary state

law or rule of finality or appealability.[1] (At least ten more states – Arizona, Arkansas, Florida, Massachusetts, Minnesota, New Hampshire, New Mexico, North Carolina, Vermont, and Wyoming – accept § 1983 defendants' immediate appeal from denial of qualified immunity motions by the state's adoption as state law of the collateral order doctrine of federal law.[2]) These states'

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[1] *City of Lakewood v. Brace*, ___ Colo. ___, ___, ___ P.2d ___, ___, No. 955C196, 1996 WL 342293, at *5 (June 24, 1996), ("[T]he United States Constitution and federal laws passed pursuant to it are equally enforceable in federal and state courts under the Supremacy Clause. Moreover, '[t]he elements of, and the defenses to, a federal cause of action are defined by federal law,' " quoting *Howlett v. Rose*, 496 U.S. 356, 375 (1990), and taking appeal even though denial of summary judgment motion is not generally appealable under state appellate rules); *Lord v. Murphy*, 561 A.2d 1013, 1016 (Me. 1989) ("M.R. Civ. P. 54(b) is thus inapplicable here because the defendants are appealing a final decision, under the collateral order doctrine, of the court's denial of their absolute or qualified immunity defense," after citing *Mitchell*); *McLin v. Trimble*, 795 P.2d 1035, 1037 (Okla. 1990) (the "scope of qualified immunity in a state court proceeding" had to be "the same as that found in Federal Court" because qualified immunity defense was a substantial right of a § 1983 defendant that could not be extinguished by a state procedural rule, so contrary state procedural rule was invalidated under Supremacy Clause).

[2] *Henke v. Superior Court of the State of Arizona*, 161 Ariz. 96, 100, 775 P.2d 1160, 1164 (Ct. App. 1989) ("state procedural rules apply as long as they do not obliterate the federal right," so defendant in § 1983 action is not required to await final judgment before appealing trial court's denial of defense); *Virden v. Roper*, 302 Ark. 125, 128, 788 S.W.2d 470, 472 (1990) ("The appealability of a denial of summary judgment based on qualified immunity from suit is clearly established," citing *Mitchell*); *Tucker v. Resha*, 648 So. 2d 1187, 1190 (Fla. 1994) ("[f]or the reasons discussed above, we find the standard announced

appellate courts are available to give state actors the benefits of qualified immunity when a trial court has erroneously ruled against that defense.

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by the Supreme Court in *Mitchell* to be the proper one for reviewing such orders"); *Breault v. Chairman of the Board of Fire Comm. of Springfield*, 401 Mass. 26, 31, 513 N.E.2d 1277, 1280-81 (1987), *cert. denied sub nom. Forastiere v. Breault*, 485 U.S. 906, 108 S. Ct. 1078, 99 L. Ed. 2d 237 (1988) ("Therefore, in the sense contemplated by our rule of present execution, the judge's order denying qualified immunity is final, and the question of the validity of the judge's order is ripe for consideration by this court," (citation omitted)); *Anderson v. City of Hopkins*, 393 N.W.2d 363, 364 (Minn. 1986) ("We believe that the *Mitchell* case is a well-reasoned case that ought to be followed in analogous cases in interpreting Minn. R. Civ. App. P. 103.03, without regard to whether it must be followed."); *Richardson v. Chevrefils*, 131 N.H. 227, 231-32, 552 A.2d 89, 92 (1988) ("Although all of the court's rulings . . . would normally be treated as interlocutory, . . . [w]e have followed *Mitchell* in accepting the State defendants' appeal from the order denying their motion for summary judgment."); *Carillo v. Rostro*, 114 N.M. 607, 616-17, 845 P.2d 130, 139-40 (1992) ("writ of error [adapted] as the procedural device for invoking the collateral order doctrine" in order to review denial of defense of qualified immunity); *Corum v. University of North Carolina*, 330 N.C. 761, 767, 413 S.E.2d 276, 280, *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992) ("a denial of a summary judgment motion is normally not immediately appealable; however, under [*Mitchell*], when a motion for summary judgment based on immunity defenses to a section 1983 claim is denied, such an interlocutory order is immediately appealable before final judgment."); *Murray v. White*, 155 Vt. 621, 625, 587 A.2d 975, 977-78 (1991) ("In [*Mitchell*], the Supreme Court held that a trial court's denial of a claim of qualified immunity met these [collateral order] requirements, and we agree with this determination."); *Park County v. Cooney*, 845 P.2d 346, 349 (Wyo. 1992) ("State courts are divided on whether

Second, the appellate courts of at least three states – Alabama, Washington, and Wisconsin – have accepted § 1983 defendants' appeals from denials of qualified immunity motions, not because of mandate of or adoption of federal law, but because they have exercised discretionary appellate jurisdiction under state law to hear such appeals.[3] These decisions do not, of course,

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interlocutory appeal is available under these circumstances. We believe the state decisions which allow appeal, for the reasons detailed in *Mitchell* as cited above, are better reasoned; and we therefore hold that an order denying dismissal of a claim based on qualified immunity is an order appealable to this court," citing *Henke*); *Abell v. Dewey*, 870 P.2d 363, 367 (Wyo. 1994) ("Even when the case is tried in state court, the elements of, and defenses to, a federal cause of action for violation of 42 U.S.C. § 1983 are defined by federal law," citing *Mitchell* for appealability of denial of motion to dismiss on ground of qualified immunity).

[3] *Ex parte Franklin County Department of Human Resources*, 674 So. 2d 1277, 1280 (Ala. 1996) (court declined to adopt collateral order doctrine, but reviewed denial of defense of qualified immunity under writ of mandamus); *Walden v. City of Seattle*, 77 Wash. App. 784, 788, 892 P.2d 745, 747 (1995) ("While a few state courts have concluded that they must also provide an immediate appeal from interlocutory immunity decisions in § 1983 actions, most states have concluded that state rules of appellate procedure control over federal procedural law in such cases and/or that the availability of some form of discretionary or extraordinary interlocutory review is sufficient to satisfy any federal requirements and avoid violation of the supremacy clause," (footnote omitted)); *Baxter v. Wisconsin Dep't of Natural Resources*, 165 Wis. 2d 298, 302, n.3, 477 N.W.2d 648, 650, n.3 (Wis. App. 1991), *review denied* 485 N.W.2d 412 (1992) ("An order denying a motion to dismiss is not final[, h]owever, if the motion to dismiss is based on a claim to qualified immunity, an order denying the motion will usually satisfy the criteria for

guarantee that the next request for discretionary review will be granted; state actors sued in these states' courts must rely on the discretion of the appellate courts to obtain the benefits of qualified immunity when a trial court has erroneously denied a qualified immunity motion.

Third, the appellate courts of at least four states – Illinois, North Dakota, Ohio, and Texas – have previously refused to hear appeals from denial of qualified immunity motions. These decisions do not allow state procedure to take into account this Court's precedents regarding the immediate appealability of denials of qualified immunity.[4] Idaho has now joined the ranks of states

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granting a petition for leave to appeal," citing *Mitchell*). Justice Maddox of the Supreme Court of Alabama concluded that *Baxter* was an example of a state court adopting the collateral order doctrine. *Ex parte Franklin County, supra*, 674 So. 2d at 1284 (Ala. 1996) (Maddox, J., concurring and dissenting).

[4] *Pizzato's, Inc. v. City of Berwyn*, 168 Ill. App. 3d 796, 798, 523 N.E.2d 51, 53 (Ill. Ct. App. 1988), *appeal denied*, 122 Ill. 2d 593, 530 N.E.2d 263 (1988), *cert. denied sub nom. City of Berwyn v. Pizzato's Inc.*, 489 U.S. 1054, 109 S. Ct. 1315, 103 L. Ed. 2d 584 (1989) ("Regardless of how well reasoned the 'collateral order' doctrine may be, it cannot be used to confer jurisdiction upon this court where none exists under Illinois law."); *Klindtworth v. Burkett*, 477 N.W.2d 176, 183 (N.D. 1991) ("[W]e hold that a denial of a motion for summary judgment based on qualified immunity [under § 1983] and statutory immunity under [North Dakota statute] is not appealable."); *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E.2d 1290, 1290 (Ct. App. 1987) (Syllabus 2 provides: "The denial of a motion for summary judgment in a case brought under Section 1983, Title 42, U.S. Code, which motion is based on a claim of qualified immunity by state officials, is not a final appealable order."); *Noyola v. Flores*, 740 S.W.2d 493, 493-94 (Tex. Ct. App. 1987)

denying immediate review. In each of these states defendants whose qualified immunity motions under § 1983 are incorrectly denied by the trial court always lose the benefit of their qualified immunity – freedom from preparation for trial and from trial itself – before attempting to rectify the error on appeal.

Thus, the state courts are divided over whether a state trial court's denial of a qualified immunity motion is immediately appealable, and their decisions are squarely in conflict. One line of cases holds that qualified immunity is a substantial federal right that cannot be defeated by a state procedure rejecting an immediate appeal from a pre-trial denial of the immunity defense; the opposite line holds that state procedures cannot be altered or preempted by this Court's qualified immunity precedents regarding the immediate appealability of denial of a qualified immunity motion. Resolution of this conflict concerning how to give effect to the key § 1983 defense of qualified immunity is worthy of the Court's review.

2. The Order Below Conflicts With This Court's Precedents That State Courts Cannot Apply State Law to Defeat Federal Rights Under § 1983

In *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), and *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990), this Court examined the

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(appeal of denial of motion for summary judgment on ground of qualified immunity dismissed because it was not allowed by Texas law).

circumstances under which state law defenses are pre-empted when a § 1983 claim is brought in state court. *Felder* involved a procedural notice-of-claim statute that Wisconsin applied to § 1983 actions. *Felder* held that the notice-of-claim statute was preempted because it was inconsistent with federal law and would produce different outcomes in § 1983 litigation based solely on whether the claim was asserted in state or federal court. "States may establish the rules of procedure governing litigation in their own courts[, but] where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.' " 487 U.S. at 138, 108 S. Ct. at 2306, quoting *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296, 70 S. Ct. 105, 106, 94 L. Ed. 100 (1949). The "Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " 487 U.S. at 151, 108 S. Ct. at 2313-14, quoting *Garret v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S. Ct. 246, 251, 87 L. Ed. 239 (1942).

Howlett involved the Florida state courts' refusal to allow a § 1983 suit against a school board because school boards were immune from suit under state law by reason of sovereign immunity. This Court held that the Supremacy Clause prevented Florida from refusing to entertain a § 1983 claim against a school board, reiterating "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." 496 U.S. at 372, 110 S. Ct at 2441. The Court would not allow Florida to discriminate against a federal claim by imposing defenses or immunities not recognized under federal law; indeed, such discrimination violated the

Supremacy Clause. *See also Burnett v. Grattan*, 468 U.S. 42, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1984), which disapproved the adoption of a state's truncated period of time within which to file a civil rights suit because such statutes inadequately accommodate the complexities of federal civil rights litigation.

This case presents the other side of the coin from *Felder* and *Howlett* – are state courts (unlike federal courts) allowed to deny § 1983 defendants the benefit of immediate appeal from denial of qualified immunity motions, thereby throwing the burden of discovery and trial upon those defendants, even when the denial of the qualified immunity motion was erroneous? *Felder* and *Howlett* were worthy of the exercise of this Court's certiorari jurisdiction to answer important questions of whether state law disadvantaging plaintiffs in state courts vis-à-vis plaintiffs in federal courts could, nevertheless, be applied in a § 1983 action; this case is worthy of this Court's certiorari jurisdiction to answer the important question of whether state law disadvantaging defendants in state courts vis-à-vis defendants in federal courts can, nevertheless, be applied.

3. Resolution of the Finality and Appealability of Denial of § 1983 Defendants' Qualified Immunity Motions in State Courts Is an Important Issue Affecting Numerous Defendants

There is a direct conflict in state court decisions regarding the finality and immediate appealability of state court denials of qualified immunity motions. The issue at stake is critically important to the numerous

§ 1983 defendants sued in state court each year. When *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), was decided, fewer than 300 cases were brought that year in federal court under all the civil rights acts. Twenty years later, in 1981 alone, nearly 32,000 suits were filed. P. Low and J. Jeffries, *Federal Courts and the Law of Federal-State Relations*, p. 854 (1987).

The numbers of § 1983 cases are burgeoning in state courts as well. "State courts as well as federal courts have jurisdiction over § 1983 cases." *Howlett*, 496 U.S. at 358, 110 S. Ct. at 2433. *Also*, *Maine v. Thiboutot*, 448 U.S. 1, 3, n.1, 100 S. Ct. 2502, 2503, n.1, 65 L. Ed. 2d 555 (1980). As this Court recognized in *Howlett*, 496 U.S. at 378, n.20, 110 S. Ct. at 1044, n.20: "Virtually every State has expressly or by implication opened its courts to § 1983 actions, and there are no state court systems that refuse to hear § 1983 cases." Oftentimes, when § 1983 defendants are sued in their personal capacities, qualified immunity is their key defense, for it will protect them from discovery and trial if they prevail. Yet, as the law now stands, whether § 1983 defendants must sacrifice the benefits of this immunity, should a trial judge erroneously rule against their motions asserting qualified immunity, depends not upon the merits of the defense itself, but, rather, upon the forum in which the defendants have been sued.

The extent to which the benefits of qualified immunity are protected from trial court errors currently comes down to the luck of the draw: Have the defendants been sued in federal or state court, and, if sued in state court, are they in a state system that finds *Mitchell* controlling or persuasive? The qualified immunity defense is far too important to the numerous state actors who rely on it for

protection against discovery and trial in groundless suits for it to be subjected to this form of legal randomness. The benefits of the immunity should not be lost simply because of the forum in which an action was brought.

It is clear that the qualified immunity defense is a substantial right. The immunity is so important that this Court has now held in *Behrens* that defendants claiming qualified immunity may twice immediately appeal if the qualified immunity defense was raised both by the motion to dismiss and motion for summary judgment. Yet, for defendants sued in state court, that immunity is completely sacrificed if a state appellate court refuses to accept an immediate appeal following an erroneous trial court determination. Because the immunity is an entitlement not to be subject to discovery and not to stand trial, that entitlement is irretrievably lost as soon as the case proceeds toward trial. Moreover, states denying an immediate appeal create a different outcome for the immunity protection based solely upon the forum of the suit, not only among the states, but between the state and federal district courts in the same jurisdiction. Denial of an immediate appeal following denial of a qualified immunity motion places § 1983 defendants sued in state court at a distinctly unfair disadvantage relative to § 1983 plaintiffs. Defendants lose the benefit of their most important federal defense merely because of the forum in which the action is entertained, while under *Felder* and *Howlett* all elements of a plaintiff's federal claim remain protected.

This situation not only creates an unlevel playing field, it also provides an incentive for removal of cases to federal courts: "More importantly, were we to withhold

the right of appeal in courts of this Commonwealth, the practical effect would be to ensure that a large number of suits under § 1983 would be removed to Federal courts." *Breualt*, 401 Mass. at 31, n.6, 513 N.E.2d at 1281, n.6.

The need for a uniform approach in both state and federal courts is important. Likewise, the conflict among the state courts needs to be resolved. State actor-Petitioners respectfully ask that this Court review this issue.

4. The Court Should Issue a Writ of Mandate to the Supreme Court of Idaho if Necessary to Preserve a Case or Controversy

Finally, the State actor-Petitioners are potentially on the horns of a dilemma. They have a real controversy with the decision of the Clerk of the Supreme Court of Idaho to dismiss their appeal, but they may not have a controversy on that issue with Respondent Fankell. The Clerk of the Supreme Court of Idaho dismissed State actor-Petitioners' appeal *sua sponte*, and Respondent Fankell has not yet taken a position on the issue of appealability of the denial of the qualified immunity motion presented by the State actor-Petitioners. Respondent Fankell should not be able to defeat this Court's jurisdiction by depriving the Court of a case or controversy by acquiescence in or agreement with State actor-Petitioners' position. This Court should issue a writ of mandamus to the Clerk of the Supreme Court of Idaho "in aid of its jurisdiction," 28 U.S.C. § 1651(a), if necessary to prevent loss of a case or controversy in order to

reach the important issue of state court appellate review of denial of qualified immunity motions under § 1983. *Cf. Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 (1962) ("Our decision reversing that case . . . emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury"). Having unsuccessfully petitioned the Supreme Court of Idaho to reverse its Clerk's decision, there is no other court that can grant the relief sought: requiring the appellate courts of Idaho to accept State actor-Petitioners' appeal.

CONCLUSION

Qualified immunity is a critically important defense to thousands of § 1983 defendants who are sued each year in state court. The importance of the qualified immunity defense in conjunction with the current conflict among the state appellate courts regarding whether federal law entitles § 1983 defendants sued in state court to an immediate appeal from denial of qualified immunity motions merits review of this issue by this Court. Moreover, in *Behrens* the Court recently settled beyond any doubt federal court defendants' eligibility to obtain immediate, repeated appellate review of denial of their qualified immunity motions. State court defendants should not be forced to sacrifice the benefits of that immunity following an erroneous decision by a state trial court solely because of the forum in which the § 1983 action is brought. The Court has previously stated there is no difference between federal and § 1983 immunity

law. Following in the wake of *Behrens*, this is an appropriate time to settle state actors' rights to appeal from denial of their qualified immunity motions when they are sued in state court. Petitioners, therefore, respectfully pray that this Court issue a writ of certiorari to the Supreme Court of the State of Idaho, and, if necessary, also issue a writ of mandamus to the Clerk of the Supreme Court of Idaho.

Respectfully submitted,

ALAN G. LANCE
Attorney General of Idaho

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendant.	ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-107

The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of appeal that it is appealable under 42 U.S.C. § 1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L. Ed 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement of Appellants; therefore, after due consideration,

IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or judgment.

DATED this 23rd day of April, 1996.

By Order of the Supreme Court

Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge James [R]. Michaud

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendant.	ORDER DENYING PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-108

An ORDER DISMISSING APPEAL was issued April 23, 1996, for the reason the Notice of Appeal was not from a final order or judgment. A PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING with attachments and AFFIDAVIT OF COUNSEL was filed by Appellants May 2, 1996. The Court is fully advised; therefore, after due consideration,

IT IS ORDERED that the PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL be, and hereby is, DENIED and this appeal is DISMISSED with the Remittitur to issue forthwith.

DATED this 23rd day of May, 1996.

Frederick C. Lyon, Clerk
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge James R. Michaud

APPENDIX C

ALAN G. LANCE
ATTORNEY GENERAL

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Attorneys for Defendants

**IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT
STATE OF IDAHO,
IN AND FOR THE COUNTY OF BONNER**

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	Case No. CV-95-00529 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, KRISTINE L. FANKELL, AND THE PARTY'S ATTORNEYS, JAMES A.

RAEON, P.O. BOX 1237, COEUR d'ALENE, ID, 83816, AND WILLIAM B. LATTA, JR., P.O. BOX 2192, BOISE, ID, 83701-2192, AND THE CLERK OF THE COURT, NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

3. The reporter's transcript is not requested.

4. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: All briefs and memorandums in support or opposition to Defendant's Motion to Dismiss.

5. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) That the appellant is exempt from paying an estimated transcript fee because no transcript has been requested.

(c) That the appellants are exempt from paying the estimated fee for the preparation of the clerk's record because the State of Idaho and its officers are exempt from paying fees for the preparation of the clerk's record.

(d) That the appellants are exempt from paying the appellate filing fee because the State of Idaho and its officers are exempt from paying appellate filing fees.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 4th day of April, 1996.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
/s/ Nicole S. McKay
Deputy Attorney General

APPENDIX D

ALAN G. LANCE
ATTORNEY GENERAL

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IN THE SUPREME COURT OF IDAHO

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Appeal No. 22880 **DEFENDANTS-APPELLANTS' PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING**

Defendants-Appellants, by and through their attorney of record, Michael S. Gilmore, Deputy Attorney General, petition for rehearing from the Court's order of April 23, 1996, dismissing their appeal. This petition for

rehearing presents a single legal issue for the court's consideration:

ISSUE ON PETITION FOR REHEARING

When a plaintiff's complaint is based in whole or in part upon claims under 42 U.S.C. § 1983, and the defendants move to dismiss under Rule 12(b)(6) and/or move for summary judgment based in whole or in part upon their claim of qualified immunity under 42 U.S.C. § 1983, is the trial court's order denying the motion to dismiss and/or motion for summary judgment a final order appealable as a matter of right with regard to the issue of denial of a claim of qualified immunity?

STATEMENT OF FACTS

Kristine L. Fankell, the Plaintiff-Respondent in this case, filed a Complaint against persons including the Defendants-Appellants Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers. See Exhibit 1. That Complaint was grounded in allegations of violations of 42 U.S.C. § 1983, in particular, in deprivation of property without due process of law. *Id.* at ¶¶ 2, 22 and 28. Defendants-Appellants moved to dismiss the Complaint pursuant to I.R.C.P. 12(b)(6). See Exhibit 2. Among other things, Defendants' memorandum in support of their motion to dismiss asserted their defense of qualified immunity under 42 U.S.C. § 1983. See Exhibit 3, pp. 2, 6-13.

The district court treated Defendants-Appellants' motion as a motion for summary judgment under Rule 56

rather than a motion to dismiss under Rule 12(b)(6). On February 23, 1996, the clerk of the court entered the district court's order denying the Defendants-Appellants' motion. See Exhibit 4. On April 4, 1996, the Defendants-Appellants filed a timely Notice of Appeal. See Exhibit 5. Paragraphs 1 and 2 of that Notice of Appeal provided the following:

> 1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.
>
> 2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

On April 23, 1996, the clerk of the Supreme Court issued an Order Dismissing Appeal. See Exhibit 6. The body of the Order Dismissing Appeal said:

> The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of Appeal that it is appealable under 42 U.S.C. § 1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L. Ed. 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement by Appellants' therefore, after due consideration,
>
> IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or judgment.

The Defendants-Appellants contend in this petition for rehearing that the district court's order denying their motion is a final order to the extent that it has denied their claim of qualified immunity under 42 U.S.C. § 1983 and that they have a right to appeal that part of the order denying the claim of qualified immunity under Idaho Appellate Rule 11(a)(1). Alternatively, if they do not have that right, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter or [sic] federal law in order to prevent discrimination by a state court against a federal claim or defense.

Legal Argument

I. The District Court's order denying the defendants' motion for summary judgment is a final order to the extent that it denies a claim of qualified immunity under 42 U.S.C. § 1983, and defendants have a right to appeal the part of the order denying their claim of qualified immunity under I.A.R. 11(a)(1)

42 U.S.C. § 1983 is a federal statute. Suits brought under 42 U.S.C. § 1983 alleging a state employee's violation of a federal constitutional right present the same issues of liability and immunity as so-called *Bivens* actions brought against federal employees directly under the federal constitution.[1] Qualified immunity is one of the defenses that may be asserted by state employees when they are sued under 42 U.S.C. § 1983. *Arnzen v. State*, 123 Idaho 899, 904-06, 854 P.2d 242, 247-49 (1993). The Supreme Court of the United States has equated the qualified immunity defenses available in cases brought under 42 U.S.C. § 1983 and *Bivens* cases:

> Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state

[1] *Bivens* actions are named after the decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

> officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909, 57 L. Ed. 2d 895 (1978). See, also, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n. 30, 102 S. Ct. 2727, 2738, n. 30, 73 L. Ed. 2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 340, n. 2, 106 S. Ct. 1092, 1095, n. 2, 89 L. Ed. 2d 271 (1986).

As a matter of practice, courts do not distinguish between the immunities available under 42 U.S.C. § 1983 and in *Bivens* actions, citing opinions in both kinds of cases interchangeably in an explication of immunity law. See, *e.g.*, *Arnzen*, 123 Idaho at 904, 854 P.2d at 247, which cites *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (*Bivens* claim against federal officer), *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (*Bivens* claim against federal officer), *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*Bivens* claim against federal agent), and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (section 1983 claim against state officer), in explication of qualified immunity defenses under 42 U.S.C. § 1983.

Denials of qualified immunity are immediately appealable as final orders. In the recent case of *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773

(1996), the Supreme Court of the United States explained the significance of a qualified immunity defense in a *Bivens* case and that denial of a claim of qualified immunity in such a case is a final, appealable decision, be the denial at the stage of a Rule 12(b)(6) motion or a motion for summary judgment. Of course, its comments on finality are also applicable to the case now before the Court, which is brought under 42 U.S.C. § 1983:

> Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over "all final decisions" of district courts. . . . It does not, however, bar review of all prejudgment orders. In *Cohen* [*v. Beneficial Industrial Loan Corp.*, 336 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L. Ed. 2d 1528 (1949),] we described a "small class" of district court decisions that, though short of final judgment, are immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself that it require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.* . . . The issue in the present case is the extent to which orders denying governmental officers' assertions of qualified immunity come within the *Cohen* category of appealable decisions.
>
> As set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the qualified-immunity defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.*, at 818, 102 S. Ct., at 2738 (citing *Procunier v.*

> *Navarette*, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L. Ed. 2d 24 (1978)). *Harlow* adopted this criterion of "objective legal reasonableness," rather than good faith, precisely in order to "permit the defeat of insubstantial claims without resort to trial." 457 U.S., at 879, 813, 102 S. Ct., at 2739, 2735-2736. Unsurprisingly, then, we later found the immunity to be "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question." *Mitchell v. Forsyth*, [472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985)]. And, as with district-court rejection of claims to other such entitlements distinct from the merits, see, *e.g.*, *Puerto Rico Aqueduct [and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-146, 113 S. Ct. 684, 688-689, 124 L. Ed. 2d 605 (1993)] (Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 662, 97 S. Ct. 2034, 2041-2042, 52 L. Ed. 2d 651 (1977) (right not to be subjected to double jeopardy), we held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell, supra*, at 530, 105 S. Ct., at 2817. See also *Johnson v. Jones*, 515 U.S. ___, ___-___, 115 S. Ct. 2151, 2155-2156, 132 L. Ed. 2d 238 (1995).

___ U.S. at ___, 116 S. Ct. at 838-39. As the Court clarified: "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal." ___ U.S. at ___, 116 S. Ct. at 839.

Drawing upon these precedents, the Supreme Court concluded that the defendants were entitled to bring successive appeals – the first from the denial of their motion to dismiss under Rule 12(b)(6) on the basis of qualified immunity, and the second from the denial of their motion for summary judgment on the basis of qualified immunity – because each decision was final from the point of view of the defendant claiming immunity, *i.e.*, each was a final determination whether the defendant would be subject to discovery or trial, which are the two things that immunity would shield the defendants from. ___ U.S. at ___, 116 S. Ct. at 839-41.[2] That the decision in *Behrens*, which is a *Bivens* case, would also apply to a § 1983 case is apparent by the Court's unqualified discussion of the rules of appeal of qualified immunity defenses in the case of *Johnson v. Jones*, 515 U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), a case decided under § 1983. ___ U.S. at ___, 116 S. Ct. at 842.

To be sure, the cases previously cited, whether § 1983 cases or *Bivens* cases, were decided under federal procedural statutes, and one might argue that the cases stand

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[2] The appellate court's review of the trial court's decision denying qualified immunity does not prevent issues unrelated to qualified immunity proceeding to trial. *Cf. Behrens*, ___ U.S. at ___, 115 S. Ct. at 841. Whether the entire case should be stayed while awaiting appellate review of the qualified immunity defense or the remainder of the case should proceed to trial is a matter within judicial discretion. But, the right to appellate review of issues associated with denial a claim of qualified immunity cannot be defeated by the defendants' obligation to stand trial on unrelated issues. ___ U.S. at ___, 115 S. Ct. at 841-42.

for nothing more than a construction of federal law concerning finality for purposes of appeal. Were the right to appeal from a denial of a 12(b)(6) motion to dismiss on the basis of qualified immunity or the right to appeal from the denial of a motion for summary judgment on the basis of qualified immunity merely a procedural right alone, Defendants-Appellants would accept that premise. But, the cases cited make it clear that the right protected is more than procedural – it is substantive:

> *Mitchell* bears particularly on the present case. There, the Attorney General of the United States appealed from a district court order denying his motion to dismiss on grounds of qualified immunity. The court of appeals held that the order was not appealable and remanded the case for trial. We reversed, holding that the order denying qualified immunity was a collateral order immediately appealable under *Cohen*. We found that absent immediate appeal, the central benefits of qualified immunity – avoiding the costs and general consequences of subjecting public officials to the risk of discovery and trial – would be forfeited. . . . "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell, supra*, at 526, 105 S. Ct., at 2815 (emphasis in original).

Puerto Rico Aqueduct, 506 U.S. at 143-44, 113 S. Ct. at 687 (footnote omitted).

The right to be spared the time and expense of discovery or trial under a claim of qualified immunity is a substantive benefit. The right to appeal from the denial of a 12(b)(6) motion on grounds of qualified immunity or to

appeal from the denial of a motion for summary judgment on grounds of qualified immunity is a final order regarding that substantive right. The Defendant-Appellants' appeal is squarely within the list of appealable orders in Idaho Appellate Rule 11(a)(1):

> **Rule 11. Appealable judgments and orders.** – An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders:
>
> (a) Civil Actions. From the following judgments and orders of a district court in a civil case:
>
> (1) Judgments, *orders* and decrees *which are final*, including orders of the district court granting or denying peremptory writs of mandate and prohibition.

Emphasis added. Because the order denying a claim of qualified immunity[3] not to stand trial for a claim brought under 42 U.S.C. § 1983 is a final order, it is appealable under I.A.R. 11(a)(1).

---

[3] This same argument on appealability of orders denying claims of qualified immunity would apply to claims of the absolute immunity defenses recognized under 42 U.S.C. § 1983: *e.g.*, legislative immunity, judicial immunity, prosecutorial immunity, testimonial immunity.

II. If the Defendants-Appellants have no right under I.A.R. 11(a)(1) to appeal the part of the district court's order denying their claim of qualified immunity, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter of federal law to prevent state court discrimination against a federal claim or defense

State courts must apply the federal rules of substantive law in a case brought under 42 U.S.C. § 1983. This is clear from the case of *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). In *Howlett* Florida citizens sued local school board members and school officials in state courts under 42 U.S.C. § 1983. Despite the precedent that local governments like municipalities or school boards were persons subject to suit under 42 U.S.C. § 1983, see *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Florida courts held that Florida had not waived a municipality's sovereign immunity from suit under 42 U.S.C. § 1983, so the Florida state courts would not entertain suits against municipalities under that statute. The Supreme Court of the United States reversed. In doing so, it explicated the relationship between state courts, state law, and federal law under 42 U.S.C. § 1983, noting that the Florida District Court of Appeal's "holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action." 496 U.S. at 366, 110 S. Ct. at 2437. The Court elaborated:

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The

Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

. . . .

Three corollaries follow from the proposition that "federal" law is part of the "Law of the Land" in the State:

1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse." [Citation omitted.] "The existence of the jurisdiction creates an implication of duty to exercise it." [Citations omitted.]

2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because a disagreement with its content or refusal to recognize the superior authority of its source. . . .

3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [Citations omitted.] The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. . . . In addition, States may apply their own neutral procedural rules to federal

claims, unless those rules are pre-empted by federal law. [Citations omitted.]

496 U.S. at 367-72, 110 S. Ct. at 2438-41 (footnote omitted).

There were only three cases in which the Supreme Court of the United States accepted a state court claim that its neutral rules of procedure or jurisdiction prevented the state court from exercising jurisdiction over a federal claim according to federal law: where state statute permitted discretionary dismissal of both federal and state claims when neither plaintiff ~~nor~~ defendant were resident of the state, *Douglas v. New York, N.H. & H.R. Co*, 279 U.S. 377, 49 S.Ct 355, 73 L. Ed. 747 (1929); where a city court was denied jurisdiction of both state and federal claims that arose outside its territory, *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L. Ed. 789 (1940); and where a state court applied a neutral doctrine of *forum non conveniens, Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1, 95 L. Ed. 3 (1950). 496 U.S. at 474-75, 110 S.Ct. 15 2442. None of those situations are present here.

Idaho does not prohibit its courts at either the trial or appellate level from considering claims brought under 42 U.S.C. § 1983. Idaho Appellate Rule 11 explicitly authorizes certain appeals from orders preceding final judgment, including those from "[a]n order granting . . . a new trial, including such orders which contain a conditional grant . . . of a new trial subject to additur and remittitur," I.A.R. 11(a)(5); "[a]ny order however denominated, reducing a charge of criminal conduct over the objection of the prosecutor," I.A.R. 11(c)(5), or "[a]n order granting a motion to suppress evidence," I.A.R. 11(c)(8). Given the availability of appellate jurisdiction in Idaho

under state law for certain kinds of orders preceding final judgments, the state cannot discriminate against federal claims or defenses by denying the Defendants-Appellants' federal right to appeal from the denial of their motion for summary judgment upon a claim of qualified immunity under 42 U.S.C. § 1983.

Summary

The Defendants-Appellants therefore pray that the Court reconsider its Order Dismissing Appeal and pray that the Court reinstate their appeal from the district court's denial of their motion for summary judgment based upon a claim of qualified immunity under 42 U.S.C. § 1983.

Dated this 2nd day of May, 1996.

State of Idaho
Office of the Attorney General

By _____
/s/ Michael S. Gilmore
Deputy Attorney General